United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2313, 74-2436

To be argued by
THOMAS M. FORTUIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-2313, 74-2436

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO SEIJO and NICHOLAS HILDEBRANDT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Docket Nos. 74-2313, 74-2436

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO SEIJO and NICHOLAS HILDEBRANDT,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Angelo Seijo and Nicholas Hildebrandt appeal from judgments of conviction entered on October 1, 1974 in the United States District Court for the Southern District of New York after a two-day trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury.

Indictment 74 Cr. 606, charged Seijo, Hildebrandt, Leonard Torres and James DiDomenico in Count One with conspiracy to violate the federal narcotics laws during the period between April 1, 1974 and June 14, 1974, the date of the filing of the indictment, in violation of Title 21, United States Code, Section 846. Count Two charged Hildebrandt, Torres and DiDomenico with distributing approximately 38 grams * of heroin on April 11, 1974. Count

* The weights charged in the indictment were gross weights. The net weights proved at trial were as follows: Count Two, 13.8 grams; Count Three, 122.0 grams; Count Four, 217.4 grams; Count Six, 7.6 grams.

Three charged Torres and Hildebrandt with distributing approximately 162 grams of heroin on April 18, 1974. Count Four charged all four defendants with distributing approximately 260 grams of heroin on June 5, 1974. Count Five charged Seijo with possessing with intent to distribute approximately 34 grams of heroin on June 5, 1974. Counts Two through Five charged violations of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2. Count Six charged Seijo with unlawfully carrying a firearm during the commission of the felonies charged in Counts One, Four and Five, in violation of Title 18, United States Code, Section 924(c)(2).

Prior to trial, Judge MacMahon severed Count Six. On the morning of trial, July 29, 1974, Torres pleaded guilty to Count One of the indictment and later that day testified for the Government. That same morning, after a hearing (Tr. 11-20), Judge MacMahon denied Seijo's motion to suppress the narcotics seized from under the seat of the Government car where he was seated after his arrest (Tr. 23A-23D).

The trial lasted two days, and on July 30, 1974 the jury found Hildebrandt guilty on all counts, Seijo guilty on Counts One and Four and not guilty on Count Five and DiDomenico guilty on Counts One and Two. Seijo and DiDomenico, who had been released on bail before and during the trial, were remanded at the time of the verdict, and Hildebrandt's bail, which he had been unable to post pending trial, was revoked. On October 1, 1974, Judge MacMahon sentenced Hildebrandt and Seijo to concurrent terms of fifteen years imprisonment on each count on which they were convicted, to be followed by a three year term of special parole.*

* DiDomenico was sentenced to a term of imprisonment of five years with a special parole term of three years to follow. Torres was sentenced to a period of probation of five years on

[Footnote continued on following page]

Statement of Facts

The Government's Case

On April 10, 1974, Detective Joseph Scamardella, a New York City Police officer assigned to the New York Drug Enforcement Task Force, posing as a heroin dealer, was introduced by Tom Frano, a Government informant, to James DiDomenico and Leonard Torres for the purpose of purchasing heroin. Torres and DiDomenico told Scamardella that their "man" had an eighth of a kilogram of heroin for someone else and that he was unwilling to break it up to sell the one-half ounce that Scamardella was willing to purchase (Tr. 39-44).*

The following day, Scamardella met with Frano at about eleven o'clock in the morning on the corner of East Tremont and Layton Avenues in the Bronx. DiDomenico and Torres joined the two of them in Scamardella's car. Inside the car DiDomenico handed Scamardella approximately 14 grams of heroin and Scamardella handed DiDomenico $600 in cash (Tr. 46, GX 1).

Less than a week later, Scamardella telephoned Torres and asked to buy an eighth of a kilogram of heroin. During the early afternoon of the following day, April 18, 1974, Scamardella met Torres who gave Scamardella a package containing approximately 122 grams of heroin for which he

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the special condition that he participate in the community based narcotic treatment program conducted under the auspices of the United States Probation Department. At the time of sentence, Counts Two, Three and Four against Torres and Count Six against Seijo were dismissed with the consent of the Government.

Notices of Appeal were filed in this Court, on October 7 and October 8, 1974 by Seijo and Hildebrandt, respectively. DiDomenico did not appeal.

* "Tr." refers to pages of the trial transcript; 'GX" to Government exhibits; and "Br." to the brief of the specified defendant.

received $4,900 in cash. (Tr. 50-51, GX 2.) Detective Drucker, who had been conducting surveillance of Detective Scamardella, followed Torres. Immediately after selling the narcotics to Scamardella, Torres drove to Neckels Beach Bar, 3307 Layton Avenue in the Bronx, double-parked his car and went inside. He immediately emerged from the bar in conversation with the defendant Nicholas Hildebrandt. Both re-entered the bar, and a few minutes later Torres left the bar and drove off. Detective Drucker followed Torres, but lost sight of Torres' car. He returned to Neckles Beach Bar where he saw Hildebrandt drinking at the bar (Tr. 170-71).

The next day Scamardella again called Torres and asked to purchase one and one-half kilograms of heroin. Torres, who had carefully avoided naming his source of supply, suipped and told Scamardella that he would have to talk to "Nick" to determine if he could obtain that large a quantity of heroin (Tr. 54). The following day, Torres telephoned Scamardella and told him that "his people" could get at least a pound, but that he was only willing to sell one-half a pound of heroin at a time and that would cost $9,000. Scamardella told Torres that he needed large amounts of narcotics and declined the offer (Tr. 54-55).

On June 3, 1974, Scamardella again called Torres. This time he asked to purchase two packages of heroin, each containing an eighth of a kilogram. The following day, after checking with his connection, Torres agreed to supply two eighths kilogram packages of heroin for $9,200 in cash.

On June 5, 1974, at about eight o'clock Scamardella went to the Howard Johnson's located across from the Bronx Zoo on Southern Boulevard and Fordham Road and there met Torres. Torres made a phone call and then told Scam-

ardella that in fifteen minutes they could leave and pick up the narcotics. Scamardella objected to leaving Howard Johnson's, where a surveillance team was in place, and asked Torres to bring the package to him. Torres agreed, stating: "Listen, when I come back I will probably have somebody with me, because my connection would want it that way. Somebody will be coming back with me probably for protection." (Tr. 57-58).

About an hour later, Torres parked his Toyota about one block from the Howard Johnson's. Just after Torres parked, a Chevrolet containing the defendants Hildebrandt and Angelo Seijo pulled up and parked about two car lengths behind the Toyota. Torres walked to the Chevrolet and talked to Seijo and Hildebrandt. He then returned to the Toyota, removed a brown paper bag and motioned to Seijo. On Torres' signal, Seijo got out of the Chevrolet, walked to the Toyota and got in. He then made a U-turn and followed a short distance behind Torres driving at about the speed Torres was walking. He followed Torres for about one block into the Howard Johnson's parking lot. (Tr. 149-51).

Torres, still carrying the bag, then joined Scamardella in the latter's car and gave him the package. Scamardella opened the trunk of his car, and Torres, Seijo and Hildebrandt were arrested (Tr. 60-61). The bag carried by Torres contained approximately 217 grams or somewhat less than a quarter kilogram of heroin (GX. 3, Tr. 196).

The arresting officers frisked Torres and Seijo, handcuffed their hands behind their backs and then placed Seijo first and Torres after him in the back seat of the car driven by Sergeant Flynn. The arresting officers immediately saw Seijo squirming and leaning forward in the back seat. After taking Torres and Seijo out of the car and upon removing the back seat, the officers found a package of heroin under

the left side of the back seat, under the area where Seijo had been sitting (Tr. 119-21; GX. 4).

That night Hildebrandt was taken to the headquarters of the Drug Enforcement Administration and advised of his constitutional rights. (Tr. 152, 157-58; GX 3510). The following morning Detective Drucker interviewed Hildebrandt. Hildebrandt assured Detective Drucker that he understood his constitutional rights and thereafter told Drucker that his source of supply for heroin was Dominick Lessa and described how he contacted Lessa (Tr. 176).*

DiDomenico was arrested the following day, June 6, 1974, and a package containing approximately two grams of heroin was seized from his right front pocket. (Tr. 190-191, 196; GX 5).

The testimony of the United States Chemist revealed that the heroin seized from under Seijo's seat (GX 4) matched in composition the heroin Torres had delivered that night (GX 3) and previously on April 11, 1974 (GX 1) and also matched the heroin seized from DiDomenico (GX 5). All four samples varied only slightly in concentration—between 15.0 and 16.9% heroin—and all four had been diluted only with lactose, which was relatively rare and occurred in only about 7% of the samples the chemist had examined (Tr. 196-98).

In addition to this evidence, the defendant Leonard Torres also testified as a Government witness. Torres, 24

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* Dominick Lessa was indicted in the case of *United States* v. *Carmine Tramunti*, Indictment No. 73 Cr. 1099, and a bench warrant was issued for his arrest on January 21, 1973 when he failed to appear for trial. Lessa continues to be a fugitive. The evidence in the *Tramunti* case disclosed that Lessa obtained his narcotics directly from Vincent Papa, a multi-million dollar narcotics trafficker and importer. See *United States* v. *Tramunti*, 377 F. Supp. 1 (S.D.N.Y. 1974), *appeal pending*, Dkt. No. 74-1550; *United States* v. *D'Amato*, 493 F.2d 359 (2d Cir. 1974).

years old at the time of his testimony, said that he first started using narcotics when he was in combat in the Army in Vietnam in 1969 (Tr. 77, 79) and became addicted to opium at that time. (Tr. 79-80). He then returned to Fort Bragg, North Carolina and subsequently was honorably discharged from the Army. When he returned to his home in the Bronx, he started using two to three bags of heroin daily and subsequently became addicted. He later enrolled in a methadone program and was maintained on methadone at the time of his testimony (Tr. 81).

Torres testified that Tom Frano had asked him and James DiDomerico to supply him with heroin. DiDomenico then introduced Torres to Nicholas Hildebrandt at Neckles Beach Bar in the Bronx so that Torres could purchase narcotics from Hildebrandt (Tr. 83-84). Torres testified about the first meeting with Scamardella and how the following morning he went to Hildebrandt's sewing shop on Morris Park Avenue in the Bronx where he found Hildebrandt. Hildebrandt invited Torres into his office where he gave him a package. Outside the shop, Torres met DiDomenico and handed him the package, which DiDomenico later handed over to Scamardella in exchange for $600 (Tr. 87-88).

Thereafter, when Torres received a telephone call from Scamardella, he met with Hildebrandt at Neckles Beach Bar and asked him for an eighth of a kilogram of heroin. Hildebrandt agreed to supply the narcotics, and the following day Torres picked up the heroin from Hildebrandt at Hildebrandt's home (Tr. 90-91). Torres then delivered the narcotics to Scamardella and brought back the $4,900 in cash to Hildebrandt (Tr. 91-92).

Shortly after this sale, Tom Frano again approached Torres and asked him for three ounces of heroin for his customers. Torres went to Hildebrandt and obtained the three ounces: one ounce as payment for the narcotics he had delivered to Scamardella and two ounces on consign-

ment (Tr. 92-93). After Torres gave the narcotics to Frano, he went to Frano's apartment to obtain payment. Frano, however, was nowhere to be found (Tr. 93-94).* When Torres told Hildebrandt what had happened, Hildebrandt informed him that he was responsible for the two ounces and that he owed him $2,400, $1,200 for each ounce (Tr. 94). Later, when Scamardella asked him for the kilogram and a half of heroin, Torres went to the Neckles Beach Bar where Hildebrandt told him that he would be willing to give Scamardella a half of pound of heroin each day for seven days (Tr. 95). Torres told Hildebrandt that arrangement was not acceptable to his customer, and Hildebrandt then insisted on payment for the money owed to him (Tr. 96).

One day, Hildebrandt called Torres and asked him to come down to the bar because there was someone whom he wanted Torres to speak to (Tr. 96). Torres went to Neckles Beach Bar where he met Hildebrandt and Seijo. Both Hildebrandt and Seijo said, "Well, listen, when are you going to come up with the money?" (Tr. 97). Seijo then told Torres, "Listen, I'm the guy behind the whole thing. I lent Nick all this money and I want to be paid for it." (Tr. 97-98). Seijo further told Torres, "I'll kill you, I'll kill your wife, your mother and father all the way up and down the line. I'll throw them in the bay in the back if you don't give me my money." (Tr. 99). After that, Hildebrandt and Seijo repeatedly called Torres, demanding their money (Tr. 99-100).

When Scamardella asked for the two eighth kilogram packages of heroin, Torres again went to Neckles Beach Bar where he met Seijo and Hildebrandt. He asked for the heroin and Hildebrandt agreed to supply it (Tr. 102-103). After meeting Scamardella at the Howard Johnson's on June 5, 1974, Torres called Hildebrandt at Neckles Beach

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* By the date the trial began, Frano had fled (Tr. 45).

Bar and Hildebrandt told him that he would be a little late but that he could supply the narcotics. Torres then went and met Hildebrandt and Seijo at Hildebrandt's sewing shop (Tr. 106-07) where Hildebrandt gave Torres the package which he put in his Toyota. Hildebrandt and Seijo then followed Torres to the Howard Johnson's (Tr. 108). At the Howard Johnson's Seijo told Torres to walk to the Howard Johnson's and and that he would drive the car behind him and follow him into the lot (Tr. 108). Earlier that day, Torres had seen Seijo with a small package of heroin which he put under his belt in the front (Tr. 240-41).

In response to the question whether he had ever been arrested prior to the arrest in this case, Torres stated, "When I was a kid we took bats and balls out of a park house." (Tr. 110-111). He was never asked whether he had any other prior arrests or any prior convictions. Torres was later asked, "They never picked you up in the Army for using drugs?" and answered, "No, sir" (Tr. 248).

On cross-examination Torres admitted that he had pleaded guilty to only one count out of the four in which he had been named in the indictment, thereby reducing the maximum penalty he could receive from 60 to 15 years (Tr. 218). He testified that he was awaiting sentencing and that he hoped his testimony would help him at the time of sentence and that he would not go to jail (Tr. 219, 244).

The Defense Case

Hildebrandt did not present any evidence.

Seijo testified in his own behalf. He testified that he was thirty-four years old. He further testified that on June 5, 1974 he had met Hildebrandt at Neckles Beach Bar and that he had been at Neckles Beach Bar repairing his boat. At Hildebrandt's urging he agreed to accompany Torres to Howard Johnson's, but had no idea that Torres was de-

livering narcotics (Tr. 282-296). He testified that the package found under the seat of the police car was not his and that he had not threatened Torres (Tr. 296, 298-99). Seijo denied following Torres into the Howard Johnson's parking lot in the Toyota and testified that, in fact, he got there before Torres did (Tr. 292). He asserted that the two officers who had testified that he followed Torres—Special Agent Biss (Tr. 150-51) and Sergeant Flynn (Tr. 134)—testified falsely (Tr. 313). He testified that after his arrest he had been put on the back seat of the Government car after Torres and that Sergeant Flynn's testimony that Seijo was put in the car first (Tr. 135, 141) was erroneous (Tr. 313). Seijo also was forced to admit that after his arrest he had made two false statements to the Assistant United States Attorney.*

Seijo called a former New York City Police Officer who testified as an expert. He testified that since the officers frisked Seijo before putting him in the car, the narcotics (GX 4) later found under the seat could not have been on Seijo's person at the time (Tr. 274). A charter fishing boat operator testified that he had seen Seijo on his boat on Neckles Beach Bar on June 5, 1974 (Tr. 317-321).

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* After his arrest, Seijo told the Assistant United States Attorney that after being arrested, handcuffed and placed in the car, he had "moved around to stop the handcuffs from hurting." At trial, he testified that he did not "move around" but merely leaned forward. (Tr. 315). This inconsistency was important because moving around would actually increase, not decrease, the discomfort of the handcuffs. (Tr. 129). The moving around, therefore, established that Seijo was attempting to dispose of the narcotics later found under the car seat (G.X. 4) and was not merely responding to the pressure of the handcuffs as he had claimed after his arrest.

Seijo also testified that his post-arrest statement that James DiDomenico "hung out" at Neckles Beach Bar was false. (Tr. 803).

James DiDomenico also testified in his own behalf. He testified he had known Seijo for a couple of months. He claimed that he was present when the narcotics were sold to Scamardella on April 11, 1974, but that, contrary to Scamardella's and Torres' testimony, he did not hand over the narcotics and did not receive the money (Tr. 323-327). DiDomenico admitted a prior conviction for the possession of a weapon (Tr. 327), and admitted on cross-examination that he had lied when he had told the Assistant United States Attorney after his arrest that he had never been present when narcotics were exchanged or discussed (Tr. 331-332).

Events Subsequent to Trial

On December 17, 1974, after notice of appeal had been filed, Thomas M. Fortuin, Esq., the Assistant United States Attorney who tried the case, filed an affidavit (Seijo's Appendix C) in the District Court in which he reported that he had recently discovered a Federal Bureau of Investigation criminal identification sheet ("rap sheet") for Leonard Torres which reflected that Torres had been convicted for possession of marijuana in Fayetteville, North Carolina in 1969. It appeared from the "rap sheet" that Torres had received a two year suspended sentence for this offense, and had been placed on probation for four years and fined $300. Although the "rap sheet" indicated that it had been received by the United States Attorney's Office on July 2, 1974, prior to the trial below, it was not sent to Mr. Fortuin until December, 1974. The document apparently had been sent in error to the file room where it remained until December.

The affidavit further showed that prior to the discovery of the "rap sheet" in December, neither Mr. Fortuin nor Assistant United States Attorney Alan R. Kaufman, to whom the case had previously been assigned, nor the police

officers assigned to the case knew of this prior conviction. After he agreed to cooperate, Torres told Mr. Fortuin that he had never been convicted of a crime prior to his arrest in this case. When defense counsel requested a copy of Torres' "rap sheet" before trial, Mr. Fortuin, in turn, asked the police officers of the New York Drug Enforcement Task Force assigned to the case to determine whether Torres had a criminal record. The officers had checked with the New York State Bureau of Criminal Identification, but the latter's records did not reveal the out-of-state arrest or conviction. These officers informed Mr. Fortuin that they had checked and that Torres had no prior convictions. Mr. Fortuin relayed this information to defense counsel.

ARGUMENT

POINT I

Seijo and Hildebrandt Are Not Entitled to a New Trial.

Appellants claim that they are entitled to a new trial because of the newly discovered evidence of Torres' prior conviction for possession of marijuana. They assert that the failure to turn over Torres' "rap sheet" to the defense upon request constitutes a violation of their due process rights under *Brady* v. *Maryland,* 373 U.S. 83 (1963). It is further argued that reversal is required because trial counsel could have used this conviction to discredit Torres generally and because the evidence of the arrest and conviction proves that Torres committed perjury at the trial. As we demonstrate below, these extravagant claims are wholly without merit. On the record before this Court, appellants have failed to demonstrate either that their due process rights were violated or that they are entitled to a new trial. The facts establish that: (1) the failure to provide the defense with the FBI "rap sheet" was not the

product of prosecutorial misconduct; (2) Torres' trial testimony has not been shown to be perjurious; (3) the marijuana conviction, at best, is merely cumulative, impeaching material of marginal relevance; and (4) Torres' testimony was *not essential* to the Government's case against appellants. His testimony, moreover, was fully corroborated by substantial, independent evidence and therefore proof of the marijuana conviction, even if it had been available to the defense, would not have avoided the guilty verdicts against Seijo and Hildebrandt on each of the counts on which they were convicted.

A. Defendants Were Not Denied Due Process of Law: The Newly-Discovered Evidence Does Not Satisfy The Test of Materiality Set Forth in *Brady* v. *Maryland*.

Under *Brady* "the suppression by the prosecution of evidence favorable to an accused upon request violates due process *where the evidence is material* either *to guilt* or to punishment, irrespective of the good faith or bad faith of the prosecution". (373 U.S. at 87; emphasis added)

As the Supreme Court later explained in *Giglio* v. *United States*, 405 U.S. 150 (1972), the critical question under *Brady* is the *materiality* of the non-disclosed evidence. Writing for a unanimous Court, Chief Justice Burger emphasized that a new trial should not automatically be granted to every defendant who manages to obtain after trial some undisclosed scrap of impeaching material concerning a witness who testified against him:

> "We do not, however, automatically, require a new trial whenever 'a combining of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .'" *United States* v. *Keogh*, 391 F.2d

138, 148 (CA 2, 1968). *A finding of materiality of the evidence is required under Brady, supra,* at 87." (405 U.S. at 154; emphasis added).*

The rule was reiterated by the Court in *Moore* v. *Illinois,* 408 U.S. 786, 794-95 (1972) as follows:

"The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favor-

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* In *Giglio* the Supreme Court reversed the judgment of conviction because the testimony of the witness to whom the undisclosed promise of leniency had been made was essential to the Government's case against the defendant: "[t]he Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury." *Id.* at 154.

Notwithstanding Seijo's claim to the contrary, neither the case against him nor against Hildebrandt depended entirely on Torres' testimony. See, pp. 3-9, *supra,* and 23-27, *infra.* Torres did not testify in the grand jury; he began cooperating after the indictment had been returned. Furthermore, there was ample evidence apart from Torres' testimony from which the jury could have found appellants guilty. See, *infra,* pp. 23-27.

Giglio, on its facts, is distinguishable for other reasons. There one Assistant United States Attorney had promised the accomplice witness that he would not be prosecuted if he cooperated with the Government. The undisclosed evidence thus bore heavily on the critical issue of the witness' motive to testify falsely. In the instant case, Torres' motive to curry favor with the prosecution was the subject of abundant and scrutinizing cross-examination; the undisclosed evidence had no bearing whatever on that motive and could be used only to impeach his credibility to the limited extent prior convictions are available for that purpose.

Finally, the witness in *Giglio* had testified unequivocally that no one had told him he would not be prosecuted-testimony squarely in conflict with the alleged promise. *Id.* at 151. As we shall establish, *infra,* Torres never stated that he had never been convicted of a crime before his guilty plea in this case, and the accusation of *perjury* on his part by Seijo is not supported by the record.

> able to the accused and is material either to guilt or punishment."

In *Moore,* the Court held that the defendant's due process rights had not been violated even though the prosecution had failed to produce evidence (including a written statement) of one witness' misidentification of the defendant despite a pre-trial request for disclosure of all written statements taken by the police from any witness and agreement by the State to produce existing statements of prosecution witnesses. In spite of the fact that misidentification was a key element of Moore's defense to the murder charge, Justice Blackman, writing for the majority, concluded that in light of all the evidence, the witness' misidentification of the defendant "was not material to the issue of guilt." 408 U.S. at 797.

As this Court recently held in *United States* v. *Pfingst,* 490 F.2d 262, 277 (2d Cir.), *cert. denied,* 94 S. Ct. 2625 (1974):

> The term 'materiality' as used in *Brady* clearly describes evidence of greater value than that which is merely 'favorable to the accused.'

Under these guiding principles we submit that the information which the Government failed to produce in this case, *i.e.,* the FBI record of Torres' prior conviction was not material to the guilt or innocence of the appellants and that therefore reversal pursuant to *Brady* is not required. See *United States* v. *Miller,* 499 F.2d 736, 743-44 (10th Cir. 1974).*

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* Reduced to its essentials, Seijo's argument is that *Brady* requires the prosecution upon request to furnish written evidence of the criminal record—or proof of the absence thereof—of every witness called to testify for the Government. Such a rule would place an impossible burden on the prosecution. As this case so

[Footnote continued on following page]

B. Appellants Have Not Satisfied Their Burden of Demonstrating That They Are Entitled to a New Trial.

Under the familiar standard governing motions for a new trial on the ground of newly discovered evidence, the defendant has the burden of establishing that the evidence: (1) was discovered after trial; (2) could not have been discovered earlier with due diligence; (3) was material to the factual issues at trial and not merely cumulative and impeaching; and (4) of such a character that it would probably produce a different verdict with event of a retrial. *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972); *United States* v. *Polisi*, 416 F.2d 573, 576-77 (2d Cir. 1969); see *United States* v. *Houle*, 490 F.2d 167, 170 (2d Cir. 1973).

In cases involving prosecutorial misconduct, *i.e.*, where the record establishes that the Government intentionally suppressed the evidence or that the high value of the evidence could not have escaped the prosecutor's attention,

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powerfully illustrates, the only way of assuring with reasonable certainty that such a record does or does not exist is to take the witness' fingerprints and send them to the FBI. Wholly apart from the unwarranted invasion of privacy of innocent witnesses and the administrative burden and expense that would result from requiring FBI examination of the fingerprints and speedy production of a report for each witness in each federal and state trial as to whom a request was made, there is simply no legal mechanism available to the Government to compel each of its witnesses to submit to fingerprinting before trial. Perhaps it was for this reason that Rule 16(a)(1)(E) of the Proposed Amendments to the Federal Rules of Criminal procedure limits the production of a Government witness' record of prior convictions to that "which is within the knowledge of the attorney for the government." While we deem Rule 16(a)(1)(E) unwise for its other provisions, it plainly embodies a practical judicial recognition that disclosure must be workable and limited to the information in the hands of the responsible Government official.

a new trial is warranted if the evidence is merely material or favorable to the defense. *United States* v. *Kahn, supra,* 472 F.2d at 287 and the case cited therein. Where the newly discovered evidence was in the possession of a responsible Government official at the time of trial but nondisclosure was inadvertent, the test is whether "there was a significant chance that this added item, developed by skilled counsel . . . , could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller,* 411 F.2d 825, 832 (2d Cir. 1969); *United States* v. *Sperling,* Dkt. No. 73-2363 (2d Cir., October 10, 1974) slip op. 5637 at 5649; *United States* v. *Kahn, supra,* 472 F.2d at 287-88; *United States* v. *Mayersohn,* 452 F.2d 521, 526 (2d Cir. 1971).

1. There Was No Prosecutorial Misconduct.

Here, there is no basis for any claim of prosecutorial misconduct, as appellant Hildebrandt, at least, apparently concedes (Hildebrandt Br. at 5). On the contrary, the record shows that the Assistant United States Attorney who prepared and tried the case and the police officers assigned to the case took affirmative steps to determine if Torres had a prior record. Government counsel asked the investigating officers if Torres had a prior record. As New York City Police officers, they, in turn, had followed their customary practice and checked with the New York State Bureau of Criminal Identification, but the latter's records did not reveal the out-of-state arrest and conviction. Thus, at the time of trial no member of the "prosecutorial team," nor any other Assistant United States Attorney connected with the case knew of Torres' prior conviction. Compare *United States* v. *Pacelli,* 491 F.2d 1108, 1119 (2d Cir. 1974); *United States* v. *Sperling, supra; United States* v. *Badalamente,* Dkt. No. 74-1517 (2d Cir. November 21, 1974), slip op. 5899. Furthermore, trial counsel for the Government had no reason to disbelieve Torres' statement before trial that he had no previous conviction. Compare *Imbler* v.

Craven, 298 F. Supp. 795 (S.D. Cal. 1969), *aff'd*, 424 F.2d 631 (9th Cir.), *cert. denied*, 400 U.S. 865 (1970).

A claim that a prosecutor "suppressed" evidence strikingly similar to that made in this case was firmly rejected by this Court in *United States* v. *Quinn*, 445 F.2d 940 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). In *Quinn*, as in this case, the defendants asked for the prior record of an important Government witness and were told by the Assistant United States Attorney that the witness had no prior convictions and that the Assistant was not aware of any prior arrests. In fact, the witness had been indicted in Florida prior to the trial. The indictment had been sealed, and the prosecutor did not learn of it until after trial. In rejecting appellants' claim that they were entitled to a new trial because the prosecutor had "suppressed evidence", this Court stated:

> However, appellants take the completely untenable position that "knowledge of any part of the government is equivalent to knowledge on the part of this prosecutor" and that "he [the New York prosecutor] must be deemed to have had constructive knowledge of this evidence. . . ." The Department of Justice alone has thousands of employees in the fifty States of the Union. Add to these many more thousands of employees of "any part of the government." Appellants' argument can be disposed of on a "reductio ad absurdum" basis. Moreover, the chronology of events refutes any knowledge of, or suppression by, the New York prosecutor of the Florida indictment. . . . The "suppression of evidence" cases cited by appellants deal with facts known to the prosecution—not to facts concededly unknown. (445 F.2d at 444; footnote omitted)

Elsewhere it has been held that the prosecution is not chargeable with the knowledge of information contained in

records in the possession of investigative agencies unconnected with the case. *United States* v. *Eley,* 335 F. Supp. 353, 358 (N.D. Ga. 1972); see also *Taylor* v. *United States,* 229 F.2d 826 (8th Cir.), *cert. denied,* 351 U.S. 986 (1956). Nor is there a duty of disclosure as between prosecutors in different Districts. *Kaufman* v. *United States,* 268 F. Supp. 484, 488-90 (E.D. Mo. 1967), *rev'd on other grounds,* 394 U.S. 217 (1969). Similarly, in this case, we submit that the prosecution was not chargeable with knowledge of the information contained in the files of the Federal Bureau of Investigation concerning Torres. The fact that a copy of the FBI "rap sheet" remained buried in the file room of the United States Attorney's Office, unbeknownst to any responsible member of the prosecutorial staff, should make no difference for purposes of determining the standard to be applied in evaluating appellants' new trial claim.

2. The Allegations of Perjury Are Not Supported by the Record.

Not content with the claim that the failure to turn over the FBI "rap sheet" requires a new trial, appellate counsel for Seijo has seen fit to embroider his argument with allegations that Torres committed perjury at the trial below (Seijo Br. 19, 22). Yet when the record is carefully examined, the "clear example of perjury" which Seijo purports to rely on can nowhere be found.

On direct examination, Torres testified, in pertinent part, as follows:

> "Q. Other than when you were arrested on that night, June 5, 1974, have you ever been arrested before? A. When I was—when I was a kid we took bats and balls out of a park house.
>
> Q. And you were arrested for that? A. Yes.
>
> Q. What was the result of that charge? Were you convicted? A. No. We were dismissed, you

know. Our parents had to come in and, you know, they said that we would be in their custody and everything. This is before I was 16. I think I was 14, 15 years old.

Q. You were charged in the indictment in this case, is that correct? A. Yes, sir." (Tr. 110-11).

In the above quoted passage, Torres never states that there were no other arrests. Nor does he state that there were no convictions other than the one in this case. The testimony is accurate, and the arrest and conviction in 1969 for possession of marijuana does not contradict it. There is simply no basis for the accusation of perjury based on Torres' direct examination.

Seijo's counsel, however, also points to Torres' cross-examination as a claimed basis for the charge of perjury. The brief asserts: "During cross-examination, when Torres was specifically asked whether he had ever been arrested *for drugs* while in the armed forces, he denied any such arrest." (Seijo Br. at 3; see also 14). The portion of the record relied on reveals that this assertion is something less than a meticulous characterization of Torres' testimony on this subject:

"Q. And let me ask you this: you were in the Army for how long? A. Two years.

Q. Two years? A. Yes, sir.

Q. Did they ever pick you up in the Army for using drugs? A. No, sir.

Q. They never picked you up in the Army for using drugs? A. No, sir." (Tr. 247-48).

It is far from self-evident that Torres' 1969 state arrest and conviction in South Carolina for possession of marijuana constitutes clear proof that the above quoted testimony is perjurious. *Bronston* v. *United States*, 409 U.S. 352 (1973). First, in the context of the preceding ques-

tions, Torres could well have understood the question, "Did *they* ever pick you up in the Army for using drugs?" to refer to an arrest by the military and not an arrest by civilian (state) police. If so, his answer was not perjurious. Second, he also could have interpreted the phrase "using drugs" as not inclusive of an arrest for possession of marijuana, since possession does not necessarily mean use and since marijuana is not commonly regarded as a "drug." See *e.g.* 21 U.S.C. §§ 802(16), 812(c). In sum, the post-trial disclosure of the 1969 arrest and conviction does not by itself * establish that appellants were convicted on a record containing perjured testimony. *Luna* v. *Beto,* 395 F.2d 35, 39 (5th Cir. 1968) (en banc).**

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* In making this argument, we are mindful of the *possibility* that Torres intended to conceal the fact of his prior marijuana conviction when he testified. The fact remains that when the *proper* questions were asked by the prosecutor before trial, Torres, for reasons not revealed by this record, denied that he had any prior convictions. If appellants were truly confident in their ability to establish that Torres had perjured himself at the trial and that he did not have a good faith basis for not disclosing the conviction, they could have moved to remand this case to the District Court in order to move for a new trial under Rule 33, Fed. R. Crim. P. based on newly discovered evidence. The District Court could then have ordered a hearing at which a proper record could be made concerning the allegations of perjury for subsequent review by this Court. Instead of following the proper procedure, *United States* v. *Aguilar,* 387 F.2d 625, 626 (2d Cir. 1967), appellants have chosen to short-circuit Rule 33 and wage their attack on appeal based on loose accusations of perjury not supported by the record. Remand for an evidentiary hearing, we submit, is the proper procedure. But if appellants are willing to rest their claim for a new trial based on *this* record, then they must be held to do so at their peril.

** Even perjured testimony, however, does not always require that a new trial be granted. *United States* v. *Pfingst,* 490 F.2d 262, 279-80 (2d Cir.), *cert. denied,* 94 S. Ct. 2625 (1974).

3. The Evidence of Torres' Marijuana Conviction Was Merely Cumulative Impeaching Material.

This Court has repeatedly held that, "the discovery of new evidence which merely discredits a Government's witness and does not directly contradict the Government's case ordinarily does not justify the grant of a new trial." *United States* v. *Aguilar*, 387 F.2d 625, 626 (2d Cir. 1967); *United States ex rel. Rice* v. *Vincent*, 491 F.2d 1326, 1329 n. 1 (2d Cir. 1974); *United States* v. *Sposato*, 446 F.2d 779, 781 (2d Cir. 1971); *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 20 (2d Cir. 1969); *United States* v. *Lombardozzi*, 343 F.2d 127, 128 (2d Cir.), *cert. denied*, 381 U.S. 938 (1969); *United States* v. *Switzer*, 252 F.2d 139, 145-46 (2d Cir. 1958); *United States* v. *Brewster*, 231 F.2d 213, 216 (2d Cir. 1956); and see *Masarosh* v. *United States*, 352 U.S. 1 (1956); Cf. *United States* v. *Trapnell*, 495 F.2d 22, 25-26 (2d Cir. 1974).

In this case, Torres was extensively impeached by other evidence and the alleged untrustworthiness of his testimony repeatedly was called to the attention of the jury. The newly discovered evidence does not show any new motive or bias on Torres' part to testify falsely and does not in any contradict the evidence of defendants' involvement in the crimes charged.

The evidence would be merely cumulative of extensive other impeaching evidence which was fully exploited and which had a far greater tendency to discredit the witness. Torres was vigorously cross-examined by the three defense lawyers. (Tr. 203-60). He testified that he had been permitted to plead guilty to one of the four counts in which he had been charged in the indictment, thereby reducing the maximum penalty he could receive from 60 to 15 years (Tr. 218); that he was awaiting sentence before Judge MacMahon and that by virtue of his testimony he hoped

he would not go to jail (Tr. 219); and that he hoped his testimony would help him at the time of sentence (Tr. 244). He further admitted that he had been addicted to both opium and heroin and that at the time of his testimony he was addicted to methadone. (Tr. 79-82, 222-23).

In this case the 1969 marijuana conviction can hardly be said to be the kind of evidence which the defense would have made the "capstone" of their attack on Torres. *United States* v. *Miller,* 411 F.2d 825 (2d Cir. 1969); *United States* v. *Pfingst, supra,* 490 F.2d at 278. This is not a case where the Government has failed to disclose the existence of a pending indictment against one of its witnesses, see *United States* v. *Houle,* 490 F.2d 167, 170-71 (2d Cir. 1973); *United States* v. *Fried,* 486 F.2d 201 (2d Cir. 1973); *United States* v. *Bonnano,* 430 F.2d 1060 (2d Cir.), *cert. denied,* 400 U.S. 964 (1970); *United States* v. *Acarino,* 408 F.2d 512, 515-16 (2d Cir.), *cert. denied,* 395 U.S. 961 (1969), nor is it a case of failure to disclose letters written by the witness which could be used to impeach him by showing that he was a liar or deranged or allegedly under extreme pressure from the prosecution to testify against the defendant, *e.g., United States* v. *Badalamente,* Dkt. No. 74-1517 (2d Cir. November 21, 1974), slip op. 5899 at 5907-08; or letters written by the witness showing a strong motive to curry favor with the Government, *e.g., United States* v. *Sperling,* Dkt. No. 74-643 (2d Cir., October 10, 1974), slip. op. 5637 at 5650-51; *United States* v. *Pacelli,* 491 F.2d 1108, 1119 (2d Cir. 1974); Cf. *Davis* v. *Alaska,* 415 U.S. 308 (1971). Rather, the conviction for possessing marijuana, at best, would only have been marginally relevant to impeach Torres' credibility.

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* *Badalamente, Sperling* and *Pacelli*—the three most recent decisions in this Circuit involving suppression of evidence claims—are also distinguishable on other grounds. In *Badalamente,* unlike this case, the undisclosed letters written by the witness were in the possession of the prosecutor during the trial. *Badalamente, supra,* at 5909. In *Pacelli,* the undisclosed letter written by the witness

[Footnote continued on following page]

4. Evidence of Torres' Conviction Would Not Produce a Different Verdict on Retrial.

The Government's case with respect to each defendant was both sufficient and strong even without the testimony of Torres. *United States* v. *Rizzuto,* 504 F.2d 419 (2d Cir. 1974); *United States* v. *D'Amato,* 493 F.2d 359 (2d Cir. 1974); *United States* v. *Ruiz,* 477 F.2d 918 (2d Cir.), *cert. denied,* 414 U.S. 1004 (1973); *United States* v. *Manfred* 488 F.2d 588, 596 (2d Cir.), *cert. denied,* 417 U.S. 936 (1974); *United States* v. *Marrapese,* 486 F.2d 918 (2d Cir.), *cert. denied,* 415 U.S. 994 (1974).

On a retrial the only new evidence that the defense would have available would be Torres' conviction for possession of marijuana, and, at best, since Torres gave no demonstrably false testimony at trial,* that he had made a false statement to an Assistant United States Attorney. In view of the strength of the Government's evidence ex-

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was reviewed by the trial prosecutor before trial but he simply overlooked the three critical paragraphs and never had occasion to go back to the statement. *Pacelli, supra,* 491 F.2d at 1119 n.8. In *Sperling,* while the trial prosecutors had no knowledge of the letter in question, the undisclosed letter was in the possession of another prosecutor who, according to this Court, should have been aware of the letter's significance. *Sperling, supra,* at 5649. Here, by contrast, neither the prosecutor who tried the case nor any other Assistant United States Attorney connected with the case knew of the FBI "rap sheet" during the trial.

Furthermore, the undisclosed letters in *Pacelli* and *Sperling* were written by the Government's key witness on whose uncorroborated testimony the case against one or more defendants rested. Similarly, in *Badalamente* the undisclosed letters were written by a witness whose testimony was crucial to the entrapment defense of one of the defendants. The same cannot be said of Torres' testimony in the instant case.

* See *supra* at pp. 19-21.

clusive of Torres' testimony * and the detailed corroboration of his testimony, this added bit of impeaching material would not produce a different verdict.

Seijo relies heavily on this Court's opinion in *United States* v. *Sperling, supra,* to support his argument for reversal. (Seijo Br. at 20-23). *Sperling,* however, demonstrates that a new trial should not be granted. In *Sperling,* the convictions of eight of eleven appellants on at least one count were affirmed despite the failure of the Government to turn over to the defense a letter written by the Government's principal witness which the Court concluded was highly significant, and which should have been produced pursuant to Title 18, United States Code, Section 3500. The convictions on the conspiracy count were affirmed because the testimony of the witness, while subject to further impeachment with the use of this letter, had already been thoroughly impeached and was adequately corroborated.

We have already shown that Torres was subjected to withering cross-examination. As far as corroboration is concerned, Torres' testimony with respect to Hildebrandt was fully corroborated by Hildebrandt's admission made to Detective Drucker in which he revealed his source of supply for heroin ** (Tr. 176). Moreover, immediately

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* Indeed, in summation the Assistant United States Attorney argued:

> "I submit to you if Mr. Torres had not come into this courtroom there would be proof in this case beyond a reasonable doubt as to the guilt of each and every one of these defendants and I will show you that later in my summation." (Tr. 352).

** With respect to Hildebrandt the prosecutor at trial argued in summation:

> 'The defendant Hildebrandt, well, they say the case rests upon the testimony of Torres. You have the words right

[Footnote continued on following page]

following Torres' delivery of an eighth kilogram of heroin to Scamardella on April 18, 1974, he was followed to Neckles Beach Bar where he talked to Hildebrandt. During his conversations with Scamardella, Torres referred to his source of supply as "Nick". When Torres delivered two eights kilogram packages of heroin to Scamardella, on June 5, 1974, Hildebrandt with Seijo followed Torres to the meeting with Scamardella.

Seijo's role in the conspiracy was also firmly established by evidence independent of Torres' testimony. On June 5, 1974, Torres told Scamardella he would return with the narcotics and with "protection." When Torres returned, Seijo parked his car nearby, got into Torres' Toyota and on Torres' signal followed closely behind him as Torres walked into the Howard Johnson's parking lot and delivered the two eighth kilograms of heroin to Scamardella. (Tr. 149-51, 134). Heroin was then discovered under the seat in the car where Seijo was seated after his arrest (Tr. 119-21; GX. 4) and the heroin was of a composition similar to the heroin delivered by Torres that evening and previously on April 11, 1974 (Tr. 196-98). Moreover, Seijo, himself, testified and corroborated much of Torres' testimony.* *Sperling, supra*

> out of his [Hildebrandt's] mouth. After he was arrested, he was asked and he admitted he was involved in narcotics, and he even told the source where he got it and he obtained the narcotics. That is what he told Detective Drucker. The words out of his own mouth. You don't need Torres for that." (Tr. 363-64).

* With respect to Seijo, the Assistant United States Attorney argued on summation:

> "I suggest to you even without the testimony of Mr. Torres, if you think of the testimony of the agents on that evening, that shows you beyond a reasonable doubt that this defendant was involved in this conspiracy, that he was dealing in narcotics on June 5th, and that he had them on him." (Tr. 369).

at 5658. This was not a case where the jury had to decide to believe either Seijo or Torres. See *United States* v. *Padgent*, 432 F.2d 101 (2d Cir., 1970). Seijo's testimony contradicted not only Torres' testimony, but also the testimony of Sergeant Flynn, who had been with the Police Department for fourteen years, and that of Special Agent Biss, a Drug Enforcement Administration agent for seven years. Furthermore, Torres admitted making two false statements to the Assistant United States Attorney after his arrest. *Sperling, supra* at 5658.

Seijo argues that the fact that the jury acquitted him on Count Five, which charged him with possessing with intent to distribute the heroin seized from under the car seat after his arrest, shows that the jury chose to disbelieve Torres' testimony on this count (Br. at 19). While obviously neither Seijo nor we know with certainty why the jury acquitted on Count Five, a far more plausible explanation is that they found the proof insufficient to establish an intent to distribute, since the quantity of heroin Seijo was charged with possessing in Count Five was a mere 7.6 grams and there was no direct evidence on the issue of intent.*

Clearly under the standard applied in *Sperling*, the evidence of Torres' conviction for possession of marijuana could not have produced a different verdict in this case.

POINT II

The Sentencing of Seijo Was Proper In All Respects.

Seijo makes three insubstantial arguments in support of his claim that the fifteen year prison term he received was improper.

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* The jury was also aware that DiDomenico had not been charged for the possession with intent to distribute the 2 grams of heroin seized from him at the time of his arrest.

The first contention is that Judge MacMahon's finding at sentencing that Seijo was the "man behind the scenes" in the narcotics conspiracy proved at trial,* was based on erroneous information.

The allegedly erroneous information was, again, Torres' testimony without the benefit of knowing of his 1969 conviction for possessing marijuana. Although there is no basis to Seijo's claim that Torres' conviction falls within *Brady* v. *Maryland,* 373 U.S. 83 (1963)** or that it would have affected Torres' credibility in any event,*** it is a sufficient answer to Seijo's argument that Judge MacMahon had an independent basis for his finding in the trial testimony, separate and apart from Torres' testimony. The testimony of the police officers about the delivery of the two eighth kilograms of heroin on June 5, 1974 and Seijo's subsequent arrest established Seijo's role as a behind-the-scenes supervisor of the operation. If Seijo had any good faith basis for believing that lack of knowledge of Torres' conviction had a measureable effect on the sentencing judge, he could promptly have moved in the District Court for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure—a motion he has had ample time to make since learning of Torres' prior conviction.

Seijo's second argument is based on the notion that Judge MacMahon was obligated to state on the record that he believed that Seijo was the "'man behind the scenes" beyond a reasonable doubt before he could consider this factor in sentencing Seijo. *United States* v. *Hendrix,* Dkt. No. 74-1603 (2d Cir., October 15, 1974), slip. op. 5803, on which he relies, does not support this contention. In *Hendrix* this Court held "that in the future perjury should not

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* Judge MacMahon commented: "You obviously, to anyone with the least knowledge of this dirty business of narcotics, it is plain as day, were the man behind the scenes, that you tried to keep out of it, that you got caught." (Tr. 422)

** See Point I (A), *supra.*

*** See Point I (B), (4) and (5).

be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the committed it." *Id.* at 5810-11. Since the rule announced in *Hendrix* was prospective and since Seijo was sentenced before the date of the *Hendrix* decision, it is inapplicable here for that reason alone. On the merits, however, *Hendrix* itself makes clear that the special rule regarding a defendant's perjured trial testimony—a rule fashioned to avoid discouraging defendants from testifying because of fear that the jury's or judge's disbelief will automatically lead to an increased sentence—is not to be applied to other sentencing factors. Sentencing judges are still entitled and encouraged to consider all relevant information about the defendant, including crimes not charged in an indictment and indeed "evidence of counts on which a defendant is acquitted." *United States* v. *Hendrix, supra,* at 5808 citing *United States* v. *Sweig,* 454 F.2d 181, 184 (2d Cir. 1972). If the district judge is entitled to consider evidence of criminal conduct as to which there has been a determination that the proof thereof did not meet the standard necessary to convict, surely he does not err in considering evidence presented at the trial and found by the jury to have been proved guilt beyond a reasonable doubt. The finding demanded by Seijo is simply not required. The District Court's reliance on the trial testimony was entirely proper. *United States* v. *Tucker,* 404 U.S. 443, 446 (1972); *United States* v. *Needles,* 472 F.2d 652, 655 (2d Cir. 1973).

Seijo's third argument concerning his sentence is, at bottom, a plea for appellate review of sentencing. The Supreme Court, however, has recently endorsed "The general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski* v. *United States,* 418 U.S. 424 (1974); see *United States* v. *Velasquez,* 482 F.2d 139, 142 (2d Cir. 1973); *United States* v. *Brown,* 479 F.2d 1170, 1172 (2d

Cir. 1973). Alteration of the principle against appellate review of sentences would require Supreme Court action or legislation by Congress.

Seijo's sentence undeniably was not a slap on the wrist. By no means, however, was it unjust. Seijo was not some pathetic addict convicted of selling a dose of heroin to another addict in order to support his own habit. Rather, the evidence showed him to be a trafficker in substantial quantities of heroin sold for thousands of dollars. Motivated by no apparent reason other than greed, Seijo, as the proof showed, provided financing for Hildebrandt's narcotics operation and was willing and ready to use threats and violence to secure his ends. Under the circumstances, there is no basis for disturbing his sentence on this appeal.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the
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of America.

THOMAS M. FORTUIN,
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Of Counsel.

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Form 2

TMF:e

79 - Affidavit of Service by Mail

mw

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

THOMAS M. FORTUIN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10th day of February, 1975 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services
509 U.S. Courthouse
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Mr. Sidney Offer
415 Lexington Avenue
New York, New York

Thomas M. Fortuin

THOMAS M. FORTUIN
Assistant United States Attorney

Sworn to before me this

10th day of February, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975